U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 25 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Under Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision.** The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), approved the immigrant visa petition on November 29, 2006. However, on September 29, 2014, he revoked its approval. The matter is now before the Administrative Appeals Office on the petitioner's appeal from the revocation. The Director's decision will be withdrawn in part, and the petition's approval will remain revoked.

The petitioner provides software development services.[1] It seeks to permanently employ the beneficiary in the United States as a computer software engineer. The petition requests classification of the beneficiary as a member of the professions holding an advanced degree under section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition.

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause for revocation if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The Director found that the petitioner and the beneficiary failed to disclose familial relationships between the beneficiary and the petitioner's owners. As a result, the Director concluded that the petitioner and the beneficiary misrepresented a material fact involving the labor certification. The Director therefore invalidated the labor certification and revoked the petition's approval.

The record indicates that the appeal is properly filed and alleges errors in fact and law. *See* 8 C.F.R. § 103.3(a)(1)(v). The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We exercise *de novo* review on appeal. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence, including new evidence properly submitted upon appeal.[2]

The Notice of Intent to Revoke

USCIS issues a notice of intent to revoke for good and sufficient cause where the evidence of record at the time of the notice's issuance, if unexplained and unrebutted, would have warranted a denial of the petition. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988). Similarly, USCIS properly issues a revocation decision if the evidence of record at the time of the decision's issuance, including any explanation, rebuttal, or evidence submitted by the petitioner, warranted such a denial. *Id.* at 452.

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[1] The Form I-140, Petition for Alien Relative, identifies the petitioner as ' However, the petitioner provided evidence on appeal that it is a New Jersey limited liability company with the legal name of

[2] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal. The instant record provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

In the instant case, the Director's Notice of Intent to Revoke (NOIR), dated December 5, 2012, informed the petitioner of evidence that the accompanying labor certification failed to disclose familial relationships between the beneficiary and the petitioner's owners. The labor certification states "No" in response to Question C.9 on the ETA Form 9089, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?"

The NOIR states that the beneficiary's wife told a USCIS officer that her sister is one of the petitioner's two owners and the wife of its other owner.[3] The NOIR also states that documentation in USCIS records supports the statement of the beneficiary's wife that the beneficiary is the brother-in-law of the petitioner's owners.

USCIS may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d). The invalidation of an accompanying labor certification renders a petition for an advanced degree professional deniable because the petition must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation establishing a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i).

A beneficiary's relationship to a petitioner is a material fact involving the labor certification application. *See, e.g., Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404-05 (Comm'r 1986) (holding that a shareholder's concealment of his interest in a petitioning corporation constituted a willful misrepresentation of a material fact and a ground for invalidation of the labor certification). To provide an "opportunity to evaluate whether the job opportunity has been and is clearly open to qualified U.S. workers, an employer must disclose any familial relationship(s) between the foreign worker and the owners, stockholders, partners, corporate officers, and incorporators by marking 'yes' to Question C.9 on the ETA Form 9089." U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions & Answers," "Familial Relationships," http://www.foreignlaborcert.doleeta.gov/faqsanswers.cfm (accessed Apr. 15, 2015). "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. ... It also includes relationships established through marriage, such as in-laws and step-families." *Id.*

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[3] A copy of a 2005 Internal Revenue Service (IRS) Schedule C identifies Ms. as the petitioner's sole proprietor. However, copies of the petitioner's federal income tax returns from 2007 through 2013 indicate that she and her husband each owns half of the company. In a January 2, 2013 affidavit, Ms. husband identified himself as an "owner/stockholder/corporate officer" of the company. Documents of record variously identify him as the petitioner's president, chief operating officer, and chief executive officer. In response to our Notice of Derogatory Information and Intent to Dismiss (NOID), dated February 26, 2015, the petitioner stated that Ms. husband manages its day-to-day operations. We will therefore refer to him as the petitioner's operations manager. The petitioner also submitted documentation identifying Ms. as the company's president. We will therefore refer to her as the petitioner's president.

The online DOL answer to the Frequently Asked Question (FAQ) further states: "Please note that failure to disclose familial relationships or ownership interests when responding to Question C.9 is a material misrepresentation and may therefore be grounds for denial, revocation or invalidation [of the labor certification application]."

The DOL website indicates that the agency did not publish the FAQ answer regarding familial relationships until July 28, 2014, after the Director's issuance of the Notice of Intent to Revoke (NOIR) on December 5, 2012. However, we must apply the law as it exists at the time of adjudication. *See, e.g., Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (citing *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943)) (holding that a federal agency must follow a change in law during its proceedings because it cannot issue decisions contrary to existing legislation). The DOL's FAQ answer is not a statute or regulation. However, we find it to be persuasive because it is consistent with earlier decisions of the Board of Alien Labor Certification Appeals (BALCA). *See Matter of HealthAmerica*, 2006-PER-000001, 2006 WL 5040202 **8-9 (BALCA July 18, 2006) (*en banc*), *superseded by regulation on other grounds at* 20 C.F.R. § 656.11(b), (stating that the persuasive authority of an FAQ answer depends in part on its consistency with earlier or later pronouncements).

In decisions before the instant petition's priority date, BALCA found that in-law relationships between aliens and their prospective employers constitute familial relationships that trigger concerns about the *bona fides* of job opportunities. *See, e.g., Matter of Marie Jean Fabroa*, 2010-PER-01071, 2011 WL 5375174 *3 (BALCA Nov. 3, 2011) (upholding certification denial where the adjudicator considered the "familial relationship" between the employer and the alien, the employer's sister-in-law, as a factor indicating a non-*bona fide* job opportunity); *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942 *3 (BALCA May 15, 2000) (stating that a relationship between an alien and his or her employer triggering concerns about a job opportunity's validity "is not only of the blood; it may also be financial, by marriage, or through friendship"); *Matter of Topco USA, Inc.*, 93-INA-00516, 1996 WL 86214 *4 (BALCA Feb. 23, 1996) (upholding a certification denial based solely on the "family relationship" between the alien and his sister-in-law, an officer and director of the employer, where the record did not contain any evidence of the job opportunity's *bona fides*); *Matter of Altobelli's Fine Italian Cuisine*, 90-INA-130, 1991 WL 239636 **3-4 (BALCA Oct. 16, 1991) (finding that an alien's relationship to his sister-in-law, the employer's corporate secretary, constituted a "family relationship").

Further, the DOL's FAQ answer follows the plain language of 20 C.F.R. § 656.17(l)(5), which requires an employer to document "any family relationship" between its employees and the alien if the alien is one of 10 or fewer employees. Based on the information on the DOL website, BALCA case law, and the plain language of the regulations, the record indicates that the beneficiary has familial relationships with the petitioner's owners.

Thus, the evidence of record at the time of the NOIR's issuance, if unexplained and unrebutted, would have warranted the petition's denial. The record then contained substantial evidence that the petitioner concealed the beneficiary's familial relationships to the petitioner's owners on the labor

certification application, constituting a willful misrepresentation of a material fact and a ground for invalidation of the labor certification. The Director therefore properly issued the NOIR regarding the petitioner's alleged misrepresentation on the labor certification.

However, the record at the time of the NOIR's issuance would not have warranted the petition's denial based on a willful misrepresentation of a material fact by the beneficiary. The record indicates that both the petitioner's owner/operations manager and the beneficiary signed the ETA Form 9089, declaring under penalty of perjury that the information on the form was true and correct.[4] The petitioner's owner/operations manager declared that he has "read and reviewed this application and that to the best of [his] knowledge the information contained herein is true and accurate." However, as the petitioner argues, the beneficiary's declaration states only "that Sections J and K [of ETA Form 9089] are true and correct."

Thus, the terms of the ETA Form 9089 limited the scope of the beneficiary's declaration to Sections J and K of the form, which requested information about him and his qualifications for the offered position. Because the beneficiary was not responsible for completing the response to Question C.9 of the ETA Form 9089, the record did not establish that he misrepresented his familial relationships to the petitioner's owners on the labor certification. The evidence of record at the time of the NOIR's issuance therefore would not have warranted the petition's denial based on the beneficiary's alleged misrepresentation on the labor certification. We will therefore withdraw the Director's finding that the beneficiary willfully misrepresented a material fact on the labor certification.[5]

The Petitioner's Misrepresentation on the Labor Certification

A willful misrepresentation of a material fact must be deliberate and voluntary, made with knowledge of its falsity. *Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999) (citations omitted). A misrepresentation is material if the alien is ineligible for the immigration benefit on the true facts, or if the misrepresentation tended to shut off a line of inquiry relevant to the alien's eligibility that might well have resulted in a proper ineligibility determination. *Id.* (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975)).

In the instant case, the Director found that the petitioner willfully misrepresented a material fact by failing to disclose the beneficiary's familial relationships to its owners in response to Question C.9

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[4] Pursuant to DOL regulations, the petitioner's owner/operations manager and the beneficiary signed the ETA Form 9089, which was filed electronically, after its electronic certification on October 4, 2006. *See* 20 C.F.R. § 656.17(a) (stating that "[a]pplications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid"). The ETA Form 9089 indicates that the beneficiary signed the form on November 13, 2006, while the petitioner's owner/operations manager signed it on November 13, 2006, identifying himself as the petitioner's "President."

[5] The petitioner also asserts that USCIS violated the beneficiary's procedural due process rights by failing to afford him an opportunity to be heard during the visa revocation process. However, we decline to address this argument because it is unnecessary to our decision. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

on the accompanying labor certification. The petitioner concedes that the beneficiary is the brother-in-law of its two owners. USCIS records indicate that the beneficiary married his wife, who is the sister of the petitioner's owner/president, on April 22, 2004. USCIS records also indicate that the petitioner's owner/president married her husband, the petitioner's owner/operations manager, before the couple immigrated to the United States in 2004. Thus, the record indicates that the beneficiary was related by marriage to the petitioner's owner/president and owner/operations manager when the petitioner filed the labor certification application on May 17, 2006.

Citing *Kungys v. United States*, 485 U.S. 759 (1988), the petitioner argues that USCIS must establish a willful misrepresentation of a material fact on a labor certification by clear and convincing evidence. However, *Kungys* involved denaturalization proceedings. In denaturalization proceedings, the government must demonstrate by clear and convincing evidence that a certificate of naturalization was procured illegally or by concealment of a material fact or willful misrepresentation. *Kungys*, 485 U.S. at 772 (citing *Schneiderman v. United States*, 320 U.S. 118, 158 (1943) (finding that the government must carry its burden of proving by clear, unequivocal, and convincing evidence that an alien illegally obtained his U.S. citizenship)).

Unlike *Kungys*, the instant matter involves visa revocation proceedings, where the petitioner retains the burden of proof. *See Matter of Ho*, 19 I&N Dec. at 588 (holding that, because the approval of a visa petition vests no rights or entitlements in its beneficiary, the burden of proof in visa revocation proceedings properly rests with the petitioner, just as it does in visa petition proceedings). In visa revocation proceedings, USCIS must produce "some evidence to show cause for revoking the petition." *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984). However, the petitioner "bears the ultimate burden of proving eligibility." *Id.; see also Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988) (finding that "good and sufficient cause" to revoke a petition's approval "does not mean that the agency has to disprove convincingly all of the evidence presented on behalf of the alien").

The situation is similar to when USCIS finds evidence that the marriage fraud bar of section 204(c), 8 U.S.C. § 1154(c), precludes approval of a petition. Once USCIS produces substantial and probative evidence that a beneficiary entered into a fraudulent marriage, a petitioner must show by a preponderance of the evidence that the beneficiary did not enter into the marriage for the purpose of evading the immigration laws. *See Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983).

The petitioner cites *Forbes v. INS*, 48 F.3d 439 (9th Cir. 1995) to support its argument. However, unlike the instant matter, *Forbes* involved deportation proceedings. The U.S. Supreme Court has held that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds of deportation are true." *Woodby v. INS*, 385 U.S. 276, 286 (1966) (explaining that the same standard of proof in denaturalization proceedings is appropriate in deportation proceedings because "[t]he immediate hardship of deportation is often greater than that inflicted by denaturalization"). Thus, the type of proceeding and the benefits at stake, not the grounds underlying the action, govern the burden and standard of proof in immigration proceedings.

Citing *Monter v. Gonzales*, 430 F.3d 546 (2d Cir. 2005), the petitioner asserts that federal courts have applied the burden and standard of proof in *Kungys* beyond denaturalization proceedings in cases involving fraud or willful misrepresentation. However, the court in *Monter* applied *Kungys*'s definitions of the terms "material" and "procure" to a case in removal proceedings, not *Kungys*'s burden and standard of proof. *See Monter*, 430 F.3d at 556 (concluding that, "even though judicial denaturalization and administrative removal may be substantially different in many respects, the difference does not support divergent readings" of the terms). The burden and standard of proof in removal proceedings are governed by statute. *See, e.g.*, section 240(c)(3) of the Act, 8 U.S.C. § 1229a(c)(3) (stating that "the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable").

For the foregoing reasons, we reject the petitioner's argument that we must demonstrate a willful misrepresentation of a material fact on a labor certification in these proceedings by clear and convincing evidence.

The petitioner also argues that it did not willfully misrepresent the beneficiary's familial relationships to its owners. The petitioner's owner/operations manager and the beneficiary attested in affidavits that the petitioner's former counsel knew of the familial relationships before the preparation and filing of the labor certification application. The petitioner's owner/operations manager stated that the petitioner relied in good faith on the advice and instructions of its former counsel.

The record also contains affidavits from the petitioner's former counsel. He also indicated that he knew of the familial relationships between the beneficiary and the petitioner's owners before preparing and filing the labor certification application. He asserted that, at the time of the labor certification's filing, the DOL had provided no guidance on the meaning of the term "familial relationships" in Question C.9 of the ETA Form 9089. He attested that he interpreted the term pursuant to section 8 C.F.R. § 213a.1, which, for affidavit of support purposes, defines the term "relative" to mean "a husband, wife, father, mother, child, adult son, adult daughter, brother, or sister." Under these circumstances, he asserted that it was "perfectly reasonable" for the petitioner to answer "No" to Question C.9 on the ETA Form 9089.

The record, including evidence submitted on appeal and in response to our NOID, does not establish that the petitioner willfully misrepresented a material fact on the labor certification. We will therefore withdraw this portion of the Director's decision and reinstate the validity of the accompanying labor certification. However, the record indicates that the petition's approval should remain revoked.

The *Bona Fides* of the Job Opportunity

Although we will withdraw the Director's findings of willful misrepresentation, the record at the time of the issuance of his Notice of Intent to Revoke (NOIR) did not establish the *bona fides* of the job opportunity.[6]

An employer must attest on a labor certification that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) *(en banc)* (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

We may deny a petition accompanied by a labor certification that does not comply with DOL regulations. *See, e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding a petition's denial where the accompanying labor certification was invalid for the geographic area of intended employment).

"[I]f there is a familial relationship between the stock holders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees," the employer, upon request, "must be able to demonstrate the existence of a *bona fide* job opportunity, i.e., the job is available to all U.S. workers." 20 C.F.R. § 656.17(l).

In the instant case, the petitioner did not disclose any relationship between itself and the beneficiary to the DOL, as it responded "no" to Question C.9 of the ETA Form 9089. The DOL was prevented from considering whether the beneficiary had influence and control over the job opportunity and whether a *bona fide* job offer existed. We find the DOL's approach set forth in *Modular Container* and 20 C.F.R. § 656.17(l) applicable to analyzing the beneficiary's influence and control over the job opportunity. Therefore, we will consider these factors on appeal.

In determining whether a *bona fide* job opportunity exists, we must consider multiple factors, including but not limited to, whether the alien: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Modular Container Sys.*, at *8. We must also consider whether the alien's pervasive presence and personal

[6] We may consider additional revocation grounds not identified by the Director. *See* 5 U.S.C. § 557(b) (stating that a federal agency possesses all the powers on review that it had in making an initial decision, except as it may limit the issues on notice or by rule); *see also Betancur v. Roark*, No. 10-11131-RWZ, 2012 WL 4862774, *9 (D. Mass. Oct. 15, 2012) (holding that we may "cure" a prior, defective notice of intent to revoke by issuing a request for evidence or notice of intent to dismiss on appeal).

attributes would likely cause the petitioner to cease operations in the alien's absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

Our February 26, 2015 NOID requested additional independent, objective evidence of the *bona fides* of the petitioner's job opportunity. The petitioner's response was received on March 27, 2015 and incorporated into the record.

The petitioner attested on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any qualified United States worker." ETA Form 9089, Question N.8.; 20 C.F.R. § 656.10(c)(8). However, as previously discussed, the petitioner admits that the beneficiary has been the brother-in-law of its owners since before the filing of the labor certification application.

The petitioner asserts that the "distant" familial relationship between the beneficiary and its owners does not establish an invalid job opportunity where: the job duties were not "tailored" to the beneficiary; he did not make company decisions; he was not an owner; the petitioner recruited for the offered position in good faith; and there were no qualified U.S. applicants for the position.

As the petitioner argues, the record does not establish that the job duties of the offered position were tailored to the beneficiary, that he had an ownership interest in the petitioner, that he sat on its board of directors, or that he was involved in founding the company. However, in addition to the beneficiary's familial relationships to the petitioner's owners, the record contains substantial evidence of his ability to influence hiring decisions and his involvement in managing the company. *See Matter of Keyjoy Trading Co.*, 87-INA-592, 1987 WL 109035 (BALCA Dec. 15, 1987) (affirming a labor certification denial where an alien was a manager and integral employee, and the employer failed to prove that a *bona fide* job opportunity existed for U.S. workers).

The labor certification, which was filed on May 17, 2006, states that the petitioner employed 12 people. The Form I-140, which was filed on November 20, 2006, states that the petitioner had 17 employees. The record contains copies of the petitioner's federal payroll tax returns, indicating that it had 13 and 10 employees, respectively, in the first and second quarters of 2006. The record therefore indicates that the petitioner had a small number of employees.

As indicated in the Director's NOIR and our NOID, the beneficiary signed numerous nonimmigrant and immigrant visa petitions on the petitioner's behalf. The petitions identify him as "director of operations" or "human resources manager."[7] These job titles suggest that he participated in managing the petitioner and influenced its hiring decisions.

[7] An organizational chart of record identifies the beneficiary as the first employee on an "ERP Technical Delivery Team," directly below the petitioner's owner/operations manager, whom the chart refers to as the petitioner's "President/CEO." The chart does not identify an ERP Team lead. However, the chart indicates a position of authority between the owner/operations manager and members of the "EMR Team," the only other team identified on the chart. The chart does not identify the positions of the petitioner's owner/president or the beneficiary's wife.

The petitioner and its owner/operations manager assert that the beneficiary signed documents on the petitioner's behalf "for a limited number of days" while its owner/operations manager was outside the United States. However, USCIS records show that the beneficiary signed 24 petitions on the petitioner's behalf from approximately May 2006 to June 2008. The record therefore suggests that he acted in a managerial capacity for the petitioner on more than a limited basis. *See Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

In addition, of the 73 petitions filed by the petitioner from May 2006 to April 2013, USCIS records indicate that its owner/operations manager signed two, including the instant petition.[8] Therefore, the record does not support the assertion of the owner/operations manager that the beneficiary served as his substitute signatory while the operations manager was temporarily outside the United States. Rather, the record indicates that the beneficiary was the petitioner's primary signatory for more than two years.

The record also indicates that the petitioner employed the beneficiary's wife. As indicated in the Director's NOIR and our NOID, when a USCIS officer telephoned the petitioner's office in August 2012 to confirm the beneficiary's employment there, the officer was forwarded to the beneficiary's wife.[9] USCIS records indicate that she confirmed her and the beneficiary's employment with the petitioner, as well as his familial relationship to her and the petitioner's owners. USCIS records also indicate that the beneficiary's wife signed 42 petitions for the petitioner from approximately April 2008 to June 2011. Some of the petitions identify her as the petitioner's director of operations.

The record also contains a copy of a March 11, 2009 contract between the petitioner and [redacted] The beneficiary's wife signed the contract on the petitioner's behalf, and the contract identifies her as a "director." Project orders regarding the beneficiary, dated March 12, 2009 and May 3, 2010, are attached to the contract and are also signed by the beneficiary's wife on the petitioner's behalf. One project order identifies her as "director," while the other states her title with the petitioner as "operations-director." These documents suggest that the beneficiary's wife is a manager of the petitioner.

In addition, the record suggests that the beneficiary and his wife participated in the recruitment process for the offered position. *See* 20 C.F.R. § 656.10(b)(2)(i) (stating that a beneficiary's participation in interviewing or considering U.S. applicants "is contrary to the best interests of U.S. workers"). The record contains a copy of an April 19, 2006 facsimile transmission from the beneficiary to the petitioner's former counsel, which included documentation of the interview results of two U.S. applicants for the position. The faxed documentation suggests that the beneficiary was

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[8] USCIS records indicate that the petitioner's owner/operations manager signed the other petition under the name '[redacted]' a name by which he identifies himself in an affidavit, dated October 23, 2014, accompanying this petition.

[9] As the petitioner argues, in our NOID, we misstated the year in which a USCIS officer spoke to the beneficiary's wife on the telephone. The petitioner also submitted an affidavit from the beneficiary's wife, attesting to the correct month and year of the conversation.

involved in the recruitment process, knew the identities and qualifications of the applicants for the offered position, and was in a position to influence the hiring decisions based on the positions of him and his wife with the petitioner.

The faxed documentation also includes copies of e-mail messages between the applicants and the beneficiary's wife. The e-mail messages indicate that the beneficiary's wife invited the applicants to be interviewed for the offered position at the petitioner's offices and later informed them that the company did not select them for the position. The e-mail messages from the beneficiary's wife to the applicants suggest that she was also in a position to influence the hiring decision regarding the position offered to her husband.

The record contains an unsigned "recruitment report," dated April 19, 2005, with a space provided for a signature and a signature block indicating that the petitioner's owner/operations manager would sign the report on behalf of the petitioner. The report states: "I ... have conducted the recruiting in accordance with all PERM requirements." However, the only "Applicant Evaluation Form" provided indicates that , an ERP analyst with the petitioner, interviewed the job applicant.[10] The record does not establish Mr. as the petitioner's "representative who normally interviews or considers U.S. workers for the job offered." 20 C.F.R. § 656.10(b)(2)(ii). The organizational chart identifies Mr. "below" the beneficiary on the ERP Team, not as a hiring official, manager, or director. These recruitment materials suggest that the petitioner did not conduct recruitment for the offered position in good faith, and that the beneficiary and his wife were involved in the process.

Thus, the record indicates the beneficiary's familial relationships to the petitioner's owners and the petitioner's employment of his wife in a managerial capacity. The record also suggests the abilities of the beneficiary and his wife to influence the hiring decisions for the offered position. *See Matter of Beximco USA, Ltd.*, 90-INA-302, 1992 WL 103438, ** 3-4 (BALCA Apr. 15, 1992) (finding no *bona fide* job opportunity where an alien - although lacking any ownership or investment interests in an employer - was involved in its management and was apparently in a position to control or influence hiring decisions).

The petitioner argues that we lack authorization to review the *bona fides* of the job opportunity, noting that USCIS regulations do not expressly authorize us to do so. The petitioner asserts that our analysis is "inappropriate," as we lack DOL's authorization or expertise to review labor certification recruitment documentation as it relates to the *bona fides* of a job opportunity. The petitioner states: "The regulations only allow for the Service to invalidate the labor certification for fraud or willful misrepresentation of a material fact; [they do] not indicate the Service can review and re-adjudicate the labor certification decision made by the Department of Labor."

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[10] The petitioner's recruitment materials indicate that the applicant was scheduled for an in-person interview at the petitioner's office, and that she was to report to the beneficiary's wife when she arrived. However, the evaluation indicates that the interview was conducted by telephone.

Although USCIS regulations do not expressly authorize us to review the *bona fides* of a job opportunity, we must undertake "an investigation of the facts in each case" to determine whether "the facts stated in the petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). We must also consult with DOL regarding employment-based immigrant visa petitions. *Id.*

As previously indicated, we may deny a petition accompanied by a labor certification that does not comply with DOL regulations. *See Sunoco Energy Dev. Co.*, 17 I&N Dec. at 284 (upholding a petition's denial where the accompanying labor certification was invalid for the geographic area of intended employment); *Che-Li Shen v. INS*, 749 F.2d 1469, 1472-73 (10th Cir. 1984) (same); *see also Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (affirming a petition's denial where the petitioner stated that he did not intend to employ the beneficiary as a live-in domestic worker pursuant to the terms of the accompanying labor certification).

Thus, based on case law and our statutory obligations to investigate a petition's facts and to consult with DOL, we have authority to review the *bona fides* of the petitioner's job opportunity.

The record at the time of the revocation of the instant petition's approval indicates familial relationships between the beneficiary and the petitioner's owners. The record also indicates that the beneficiary and his wife occupied managerial positions in the company and possessed the abilities to influence the hiring process. The petitioner did not provide any evidence to rebut this evidence. The record therefore does not establish the availability of the offered position to all U.S. workers and thus the validity of the accompanying labor certification. We will therefore revoke the petition's approval on this ground.

The Petitioner's Ability to Pay the Proffered Wage

The record at the time of the revocation also did not establish the petitioner's continuing ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

The priority date of the instant petition is May 17, 2006, which is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states the proffered wage of the offered position of computer software engineer as $72,200 per year.

The record contains copies of the petitioner's federal income tax returns from 2007 through 2013.[11] However, the record does not contain a copy of an annual report, federal income tax return, or audited financial statement for 2006.

[11] The returns indicate that they were prepared on March 9, 2015, after we issued our NOID on February 26, 2015. The

Evidence of a petitioner's ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2). A petitioner must demonstrate its ability to pay "at the time the priority date is established." *Id.* Thus, the instant petitioner must submit a copy of an annual report, federal tax return, or audited financial statements for 2006, the year during which the petition's priority date was established. If the petitioner is unable to provide a required document, it must demonstrate the unavailability of the document and submit secondary evidence, such as government or business records. 8 C.F.R. 103.2(b)(2)(i).

On appeal, the petitioner states that it and its accountant maintain its tax records for only four years after filing and that it was unable to find its federal income tax return for 2006.[12] The petitioner argues that neither it nor the beneficiary "should be penalized for failure to maintain records well beyond the requisite amount of time determined by a separate government agency."[13] Because USCIS originally decided the petition several years ago, the petitioner argues that "it is inevitable that some records and documentation are no longer available."

However, the petitioner has not demonstrated the unavailability of required documentation. Counsel's statement that the petitioner and its accountant were unable to find to its 2006 tax return does not constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (stating that counsel's unsupported assertions do not establish facts of record). Even if the petitioner had demonstrated the unavailability of its 2006 federal tax return, it has not demonstrated the unavailability of other acceptable documentation of its ability to pay for that year – such as audited financial statements.

Also, in our NOID, we notified the petitioner that it must demonstrate an ability to pay the combined proffered wages of the instant petition and another petition) that USCIS records indicate remained pending after the instant petition's priority date. We explained that, because the petitioner must demonstrate its ability to pay the proffered wage of each petition it files, it must establish its ability to pay the combined proffered wages of both petitions from the instant petition's priority date until the other beneficiary obtained lawful permanent resident status, or until the other petition was denied, withdrawn, or revoked. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our revocation of a petition's approval where the record did not establish the petitioner's ability to pay multiple beneficiaries).

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preparation date of the tax returns suggests that they were prepared solely for the purposes of responding to our NOID. The record also does not contain evidence that IRS received the returns. Thus, the petitioner's tax returns have little evidentiary value.

[12] The March 9, 2015 preparation date stated on the tax returns submitted by the petitioner, however, suggest that the company does not maintain its tax returns for four-year periods.

[13] The IRS generally requires small businesses to keep tax records for three years after their filings. *See* Internal Revenue Serv., "How long should I keep records?" at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/How-long-should-I-keep-records (accessed Apr. 15, 2015).

In response, the petitioner did not provide any information or evidence that we requested about the other petition. The record therefore does not establish the petitioner's ability to pay the combined proffered wages of both of its petitions.

The petitioner argues that its purported employment of the beneficiary at annual wages above the proffered wage constitutes *prima facie* evidence of its ability to pay. The petitioner relies on a USCIS policy memorandum to support its argument. *See* Memorandum, William R. Yates, Assoc. Dir. for Operations, "Determination of Ability to Pay under 8 CFR 204.5(g)(2)" (May 4, 2004), *available at* http://www.uscis.gov/sites/default/files/files/nativedocuments/abilitytopay_4may04.pdf (accessed Apr. 15, 2015). The memo states that USCIS adjudicators should make positive ability-to-pay determinations if "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." *Id.* at 2.

We are not bound by USCIS policy memos. *See, e.g., R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (stating that unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated). Even if we were, the memo cited by the petitioner does not specifically address petitioners with multiple beneficiaries. Under the memo's analysis, a petitioner with multiple beneficiaries, like the petitioner, must demonstrate that it paid *each* beneficiary a salary equal or greater than their proffered wages to establish a *prima facie* ability to pay. In the instant case, the petitioner has not demonstrated that it paid the beneficiary of its other pending petition a salary equal or greater than the proffered wage.[14]

Moreover, the petitioner has not demonstrated that it continually paid the instant beneficiary at a salary equal to or greater than the proffered wage. The petitioner submitted evidence that it annually paid the beneficiary more than the proffered wage of $72,200 from 2007 through 2010.[15] However, the record does not contain evidence that the petitioner paid the beneficiary a salary equal to or greater than the proffered wage in 2006.

Because the petitioner has not submitted required evidence or demonstrated its unavailability, the record does not establish the petitioner's continuing ability to pay the proffered wage. The petition will also therefore be revoked on this ground.

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[14] The memo also makes clear that a petitioner's employment of a beneficiary at a salary equal or greater than the proffered wage does not excuse the petitioner's failure to submit documentation required by 8 C.F.R. § 204.5(g)(2). *See id.* (stating that "[r]equired initial evidence, as specified under 8 CFR 204.5(g)(2), includes copies of: (1) annual reports, (2) federal tax returns, or (3) audited financial statements. The petitioner must submit a copy of at least one of these required documents") (emphasis in original).

[15] The record indicates that the petitioner employed the beneficiary from 2005 to 2010, when he began working for another employer.

Conclusion

The Director erred in concluding that the petitioner and the beneficiary misrepresented a material fact on the accompanying labor certification by failing to disclose the beneficiary's familial relationships to the petitioner's owners. The Director's findings of willful misrepresentation will therefore be withdrawn, and the validity of the labor certification will be reinstated.[16] However, the record at the time of the revocation indicates that the petition was revocable on other grounds. The record did not establish the *bona fides* of the job opportunity or the petitioner's continuing ability to pay the proffered wage. The petition will therefore be revoked on those grounds.

The petition's approval will remain revoked for the foregoing reasons, with each considered an independent and alternative basis for revocation. In visa petition revocation proceedings, the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Ho*, 19 I&N Dec. at 588. Here, that burden has not been entirely met.

ORDER: The Director's decision of September 29, 2014 is withdrawn in part. The appeal is dismissed, and the petition's approval remains revoked.

FURTHER ORDER: The accompanying labor certification is reinstated.

[16] Our determination does not preclude the DOL from finding otherwise. *See* 20 C.F.R. § 656.32(a) (authorizing DOL to revoke an approved labor certification if the certification was "not justified").